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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services

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DATE: DEC 05 2011 Office: CALIFORNIA SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(L)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew

Chief, Administrative Appeals Office

DISCUSSION: The Director, California Service Center, denied the nonimmigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner filed this nonimmigrant petition seeking to extend the beneficiary's employment as a nonimmigrant intracompany transferee pursuant to section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(L). The petitioner, an Arizona corporation, states that it operates a Thai restaurant. It claims to be a subsidiary of [REDACTED].

[REDACTED] The beneficiary was initially granted L-1A status in 2006 and the petitioner now seeks to extend her status so that she may continue to serve in the position of president.

The director denied the petition, concluding that the petitioner failed to establish that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

The petitioner subsequently filed an appeal. The director declined to treat the appeal as a motion and forwarded the appeal to the AAO for review. On appeal, counsel for the petitioner asserts that the evidence of record establishes that all of the beneficiary's job duties are primarily executive in nature. Counsel solely submits a brief in support of the appeal.

I. The Law

To establish eligibility for the L-1 nonimmigrant visa classification, the petitioner must meet the criteria outlined in section 101(a)(15)(L) of the Act. Specifically, a qualifying organization must have employed the beneficiary in a qualifying managerial or executive capacity, or in a specialized knowledge capacity, for one continuous year within three years preceding the beneficiary's application for admission into the United States. In addition, the beneficiary must seek to enter the United States temporarily to continue rendering his or her services to the same employer or a subsidiary or affiliate thereof in a managerial, executive, or specialized knowledge capacity.

The regulation at 8 C.F.R. § 214.2(l)(3) states that an individual petition filed on Form I-129 shall be accompanied by:

- (i) Evidence that the petitioner and the organization which employed or will employ the alien are qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section.
- (ii) Evidence that the alien will be employed in an executive, managerial, or specialized knowledge capacity, including a detailed description of the services to be performed.
- (iii) Evidence that the alien has at least one continuous year of full-time employment abroad with a qualifying organization within the three years preceding the filing of the petition.
- (iv) Evidence that the alien's prior year of employment abroad was in a position that was managerial, executive or involved specialized knowledge and that the alien's prior education, training, and employment qualifies him/her to perform the intended

services in the United States; however, the work in the United States need not be the same work which the alien performed abroad.

Section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A), defines the term "managerial capacity" as an assignment within an organization in which the employee primarily:

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B), defines the term "executive capacity" as an assignment within an organization in which the employee primarily:

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and
- (iv) receives only general supervision or direction from higher-level executives, the board of directors, or stockholders of the organization.

II. The Issue on Appeal

The sole issue addressed by the director is whether the petitioner established that the beneficiary will be employed in the United States in a primarily managerial or executive capacity.

Facts and Procedural History

The petitioner filed the Form I-129, Petition for a Nonimmigrant Worker, on January 23, 2009. The petitioner indicated on the Form I-129 that it is operating a Thai restaurant with four employees and gross annual income of \$150,000. The petitioner stated that the beneficiary performs the following duties:

In her capacity, [the beneficiary] will continue to plan, set up and direct the policies of the company. She will also continue to direct and control the management of the company. In addition, she will continue to review the financial statements to maximize the revenue and report to the parent company in Thailand.

In this capacity, she will be paid at an annual salary of \$30,000 and will be responsible for the following:

- Establish the company's goals, objectives and procedures
- Plan, develop, and direct the organization of the company
- Exercise wide latitude in discretionary decision-making
- Create and review Financial Statements to maximize revenue, and report to the parent company
- Make any policy decisions and submit policy recommendations to the board of directors and higher level of the organization

The petitioner did not submit any additional information describing the duties of the beneficiary on a day-to-day basis. The petitioner submitted an organizational chart for the domestic company listing the beneficiary as the "president," a manager, a cook, a cashier/waitress, a waitress, and an unnamed, part-time dishwasher.

The director issued a request for additional evidence ("RFE") on January 28, 2009 instructing the petitioner to submit, *inter alia*, the following: (1) indicate the total number of employees at the U.S. location where the beneficiary will be employed; (2) a copy of the U.S. company's organizational chart clearly identifying the beneficiary's position and the employees she supervises by name and job title, including a brief description of job duties, educational level, annual salaries/wages and immigration status for all employees under the beneficiary's supervision; (3) a more detailed description of the beneficiary's duties indicating exactly whom the beneficiary directs including this job title and position description and the percentage of time the beneficiary spends performing each of the listed duties; and (4) copies of the U.S. company's state quarterly wage reports for the last eight quarters.

In response to the RFE, the petitioner submitted a list of employees for the domestic company including their current immigration status, an organizational chart for the domestic company, a letter indicating the beneficiary's job duties at the domestic company, a quarterly wage report for the third quarter of 2008 of the domestic company, and the 2006, 2007 and 2008 federal and state income taxes for the domestic company.

The organizational chart for the U.S. company listed the beneficiary as the "president," a manager, two chefs, a cashier/waitress, two waitresses, and an unnamed, part-time dishwasher. The list of employees for the domestic company includes each employee's current immigration status, but fails to list a description of each employee's job duties, educational level, and annual salaries/wages.

The petitioner described the beneficiary's job duties as follows:

Due to the needs of managing and operating the US subsidiary, [the petitioner] would like to have [the beneficiary] as President permanently. She will be entirely responsible for establishing, developing and managing the new company as well as being responsible for the entire business operations in the United States.

In her capacity, [the beneficiary] will perform the duties as follows:

- Direct and coordinate the company's financial and budget activities to maximize the investments – 20%
- Direct, plan and implement policies, objectives and activities of [the] company to maximize profit and to improve our food and service – 20%
- Direct and coordinate activities of business concerned with food and service, pricing, sales and quality of production and service to meet applicable standards – 15%
- Review reports suggesting changes which have been submitted by the sub-ordinates – 10%
- Assign and delegate responsibility to the management and employees – 15%
- Confer with board members and create the monthly and yearly reports to be presented to the board members and parent company in Thailand – 20%

The petitioner's Arizona quarterly wage report for the third quarter of 2008 lists five employees and total wages, tips, and other compensation paid to employees as \$15,800. Of the employees listed on the quarterly wage report, two are not listed on the initial organizational chart and two employees that are listed on the initial organizational chart are not listed on the quarterly wage report; however, all of the employees listed on the quarterly wage report are listed on the second organizational chart submitted in response to the RFE and two employees that are listed on the second organizational chart are not listed on the quarterly wage report (the same two employees from the initial organization chart). Additionally, the salaries and wages listed on the federal income tax returns \$41,840 for 2006; \$36,175 for 2007; and \$57,100 for 2008.

The director denied the petition on March 23, 2009, concluding that the petitioner failed to establish that the beneficiary would be employed in a primarily managerial or executive capacity under the extended petition. In denying the petition, the director observed inconsistencies in the record with respect to the number of employees actually working for the company and emphasized that the petitioner failed to submit the requested quarterly wage reports evidencing salaries and wages paid to employees and the requested job descriptions for subordinate staff. Further, the director found that the petitioner's descriptions of the beneficiary's duties were too broad to convey any understanding of what she does on a day-to-day basis.

In support of the appeal, counsel submits a brief in which he asserts that all of the beneficiary's duties are "primarily" executive in nature. Counsel further asserts that "[i]n regards to the duties being too broad and nonspecific, it is incomprehensible of how the job duties could be more specific or more in-depth. The job duties of an executive of any business are by the very nature of the position, very comprehensive and broad." Finally, with respect to the discrepancies observed by the director regarding the number of employees, counsel asserts that the employee list and organizational chart submitted in response to the RFE simply reflect the expansion of the U.S. company.

Discussion

Upon review, and for the reasons stated herein, the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition.

When examining the executive or managerial capacity of the beneficiary, the AAO will look first to the petitioner's description of the job duties. *See* 8 C.F.R. § 214.2(l)(3)(ii). The petitioner's description of the job duties must clearly describe the duties to be performed by the beneficiary and indicate whether such duties are in either an executive or a managerial capacity. *Id.* Beyond the required description of the job duties, U.S. Citizenship and Immigration Services (USCIS) reviews the totality of the record when examining the claimed managerial or executive capacity of a beneficiary, including the petitioner's organizational structure, the duties of the beneficiary's subordinate employees, the presence of other employees to relieve the beneficiary from performing operational duties, the nature of the petitioner's business, and any other factors that will contribute to a complete understanding of a beneficiary's actual duties and role in a business.

The AAO does not doubt that the beneficiary will have the appropriate level of authority over the petitioner's business as its president. However, the definitions of executive and managerial capacity each have two parts. First, the petitioner must show that the beneficiary performs the high-level responsibilities that are specified in the definitions. Second, the petitioner must show that the beneficiary *primarily* performs these specified responsibilities and does not spend a majority of his or her time on day-to-day functions. *Champion World, Inc. v. INS*, 940 F.2d 1533 (Table), 1991 WL 144470 (9th Cir. July 30, 1991). The fact that the beneficiary owns or manages a business does not necessarily establish eligibility for classification as an intracompany transferee in a managerial or executive capacity within the meaning of sections 101(a)(15)(L) of the Act. *See* 52 Fed. Reg. 5738, 5739-40 (Feb. 26, 1987) (noting that section 101(a)(15)(L) of the Act does not include any and every type of "manager" or "executive").

In the instant matter, the petitioner initially described the beneficiary's proposed position in very broad terms, noting she will "[e]stablish the company's goals, objectives and procedures," "[p]lan, develop, and direct the organization of the company," "[e]xercise wide latitude in discretionary decision-making," "[c]reate and review financial statements to maximize revenue, and report to the parent company," "[m]ake any policy decisions and submit policy recommendations to the board of directors and higher level of the organization." These duties merely paraphrase the statutory definition of executive capacity. *See* section 101(a)(44)(B) of the Act. Conclusory assertions regarding the beneficiary's employment capacity are not sufficient. Merely repeating the language of the statute or regulations does not satisfy the petitioner's burden of proof. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F. 2d 41 (2d. Cir. 1990); *Avyr Associates, Inc. v. Meissner*, 1997 WL 188942 at *5 (S.D.N.Y.).

When requested to clarify the nature of the beneficiary's duties, the specific tasks she performs, and the amount of time she devotes to specific tasks, the petitioner's response was nearly as generalized as the description previously submitted. The petitioner indicated that the beneficiary's duties include "[d]irect and coordinate financial and budget activities – 20%," "[d]irect, plan and implement policies, objectives and activities – 20%," "[d]irect and coordinate activities concerned with food and service, pricing, sales and quality of production and service – 15%," "[r]eview reports suggesting changes submitted by sub-ordinates – 10%," assign and delegate responsib[ility] to management and employees – 15%," "[c]onfer with board members and create monthly/yearly reports – 20%." The AAO notes that counsel's brief, submitted on appeal, states, "[t]hese tasks speak for themselves. It is difficult, if not impossible, to state with any more clarity the duties as President of an organization. Common sense fills in the blanks, if there are any, of the duties listed." USCIS will not accept a vague job description and speculate as to what the beneficiary actually does on a day-to-day basis as the petitioner's president. While these tasks are undoubtedly necessary in order to establish the U.S. operations, the petitioner has not indicated how such duties qualify as either managerial or executive in nature. Reciting the beneficiary's vague job responsibilities or broadly-cast business

objectives is not sufficient; the regulations require a detailed description of the beneficiary's daily job duties. The petitioner has failed to provide any detail or explanation of the beneficiary's activities in the course of her daily routine. The actual duties themselves will reveal the true nature of the employment. *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. 1103, 1108 (E.D.N.Y. 1989), *aff'd*, 905 F.2d 41 (2d. Cir. 1990).

The statutory definition of "managerial capacity" allows for both "personnel managers" and "function managers." See section 101(a)(44)(A)(i) and (ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(i) and (ii). Personnel managers are required to primarily supervise and control the work of other supervisory, professional, or managerial employees. Contrary to the common understanding of the word "manager," the statute plainly states that a "first line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional." Section 101(a)(44)(A)(iv) of the Act; 8 C.F.R. § 214.2(l)(1)(ii)(B)(2).

If the petitioner claims that the beneficiary will be employed as a personnel manager, the petitioner's evidence must substantiate that the duties of the beneficiary and her proposed subordinates correspond to their placement in the organization's structural hierarchy; artificial tiers of subordinate employees and inflated job titles are not probative and will not establish that an organization is sufficiently complex to support an executive or managerial position. While the petitioner has submitted a proposed organizational chart depicting two tiers of proposed managerial employees supervising a staff of one cashier, two waitresses, two chefs, and a dishwasher, the petitioner has not shown how a restaurant would support this staffing structure. The petitioner has not provided credible evidence of a proposed organizational structure that would be sufficient to elevate the beneficiary to a supervisory position that is higher than a first-line supervisor of non-professional employees.

In evaluating whether the beneficiary manages professional employees, the AAO must evaluate whether the subordinate positions require a baccalaureate degree as a minimum for entry into the field of endeavor. Section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), states that "[t]he term *profession* shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." The term "profession" contemplates knowledge or learning, not merely skill, of an advanced type in a given field gained by a prolonged course of specialized instruction and study of at least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor. *Matter of Sea*, 19 I&N Dec. 817 (Comm. 1988); *Matter of Ling*, 13 I&N Dec. 35 (R.C. 1968); *Matter of Shin*, 11 I&N Dec. 686 (D.D. 1966). Therefore, the AAO must focus on the level of education required by the position, rather than the degree held by a subordinate employee. The possession of a bachelor's degree by a subordinate employee does not automatically lead to the conclusion that an employee is employed in a professional capacity as that term is defined above. Here, the petitioner has submitted an organizational chart depicting the beneficiary as the president supervising one manager who supervises a cook, two waitresses, and a part-time dishwasher. The petitioner failed to submit any job descriptions or educational requirements for the subordinate employees that would evidence the need for professional staff.

The petitioner stated that the restaurant was established in 2005 and the beneficiary has been employed by the petitioner since 2006 in L-1A status. On the Form I-129, the petitioner indicated that it had four employees; the initial organizational chart submitted by the petitioner indicated that it employed the beneficiary as president, one manager, one cook, one cashier/waitress, one waitress, and one unnamed part-time dishwasher. The sole quarterly wage report submitted by the petitioner for the third quarter of 2008 indicates that the petitioner paid wages to the beneficiary, the cook, and the manager listed on the initial organizational chart, as

well as two other employees not listed on the organizational chart; the cashier/waitress and the waitress were not listed as paid employees in the quarterly wage report submitted. In response to the RFE, the petitioner submitted a new organizational chart indicating that it employed the beneficiary as president, one manager, two chefs, one cashier/waitress, two waitresses, and one unnamed part-time dishwasher. The two other employees listed on the quarterly wage report were now listed on the new organizational chart along with all the previously named employees.

On appeal, counsel explains that the new organizational chart submitted in response to the RFE reflects the expansion of the U.S. company which is why there are additional employees included. Given that the two additional employees listed on the new organizational chart were paid wages in 2008, the AAO questions why the petitioner failed to include said employees on the initial organizational chart and why the two named employees that were on the initial organizational chart were not listed as paid employees on the quarterly wage report. Furthermore, the petitioner also failed to provide job descriptions and evidence of wages for each of the beneficiary's subordinate employees, without which the AAO cannot determine who was working for the U.S. company at the time of filing the petition, what duties they performed, and whether any of them were managers, supervisors, or professionals. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The petitioner has neither claimed nor established, in the alternative, that the beneficiary is employed primarily as a "function manager." The term "function manager" applies generally when a beneficiary does not supervise or control the work of a subordinate staff but instead is primarily responsible for managing an "essential function" within the organization. See section 101(a)(44)(A)(ii) of the Act, 8 U.S.C. § 1101(a)(44)(A)(ii). If a petitioner claims that the beneficiary is managing an essential function, the petitioner must identify the function with specificity, articulate the essential nature of the function, and establish the proportion of the beneficiary's daily duties attributed to managing the essential function. In addition, the petitioner must provide a comprehensive and detailed description of the beneficiary's daily duties demonstrating that the beneficiary manages the function rather than performs the duties relating to the function. An employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. See sections 101(a)(44)(A) and (B) of the Act (requiring that one "primarily" perform the enumerated managerial or executive duties); see also *Matter of Church Scientology International*, 19 I&N Dec. 593, 604 (Comm. 1988). Here, the petitioner did not claim that the beneficiary performs as a function manager. The petitioner did not articulate the beneficiary's duties as a function manager and did not provide a breakdown indicating the amount of time the beneficiary spends on duties that would demonstrate she manages an essential function of the U.S. company.

The statutory definition of the term "executive capacity" focuses on a person's elevated position within a complex organizational hierarchy, including major components or functions of the organization, and that person's authority to direct the organization. Section 101(a)(44)(B) of the Act, 8 U.S.C. § 1101(a)(44)(B). Under the statute, a beneficiary must have the ability to "direct the management" and "establish the goals and policies" of that organization. Inherent to the definition, the organization must have a subordinate level of employees for the beneficiary to direct and the beneficiary must primarily focus on the broad goals and policies of the organization rather than the day-to-day operations of the enterprise. An individual will not be deemed an executive under the statute simply because they have an executive title or because they "direct" the

enterprise as the owner or sole managerial employee. The beneficiary must also exercise "wide latitude in discretionary decision making" and receive only "general supervision or direction from higher level executives, the board of directors, or stockholders of the organization." *Id.* The beneficiary in this matter has not been shown to be employed in a primarily executive capacity. The petitioner failed to demonstrate that the beneficiary's duties will primarily focus on the broad goals and policies of the organization rather than day-to-day operations. As discuss further below, the petitioner has not established that the beneficiary has sufficient subordinate employees to relieve her from performing non-qualifying duties.

The AAO acknowledges that a company's size alone, without taking into account the reasonable needs of the organization, may not be the determining factor in denying a visa to a multinational manager or executive. See § 101(a)(44)(C) of the Act, 8 U.S.C. § 1101(a)(44)(C). In reviewing the relevance of the number of employees a petitioner has, however, federal courts have generally agreed that USCIS "may properly consider an organization's small size as one factor in assessing whether its operations are substantial enough to support a manager." *Family Inc. v. U.S. Citizenship and Immigration Services* 469 F. 3d 1313, 1316 (9th Cir. 2006) (citing with approval *Republic of Transkei v. INS*, 923 F.2d. 175, 178 (D.C. Cir. 1991); *Fedin Bros. Co. v. Sava*, 905 F.2d 41, 42 (2d Cir. 1990)(per curiam); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25, 29 (D.D.C. 2003)). It is appropriate for USCIS to consider the size of the petitioning company in conjunction with other relevant factors, such as a company's small personnel size, the absence of employees who would perform the non-managerial or non-executive operations of the company, or a "shell company" that does not conduct business in a regular and continuous manner. See, e.g. *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001).

The petitioner indicated that it operates a restaurant that is open 55 hours per week. According to the evidence submitted by the petitioner, it only employs the beneficiary, a manager, two cooks, and one waitress. The petitioner has not explained how two cooks and one waitress could fully staff this restaurant for the duration of time it is open for business. The petitioner has not documented that it employs a dishwasher, busboys, etc., or subordinate staff to non-qualifying perform administrative/clerical duties associated with operating a business. The petitioner has not established that the beneficiary's subordinate staff could relieve her from performing non-qualifying duties associated with operating a restaurant seven days per week.

While performing non-qualifying tasks necessary to produce a product or service will not automatically disqualify the beneficiary as long as those tasks are not the majority of the beneficiary's duties, the petitioner still has the burden of establishing that the beneficiary is "primarily" performing managerial or executive duties. Section 101(a)(44) of the Act. Here, that burden has not been met.

The AAO will uphold the director's determination that the petitioner has not established that the beneficiary will be employed in a primarily managerial or executive capacity under the extended petition. Accordingly, the appeal will be dismissed.

The petition will be denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.